

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

**MARY E. BROWN v. CARL B. BROWN, JR.,
A/K/A SUSAN RAE BROWN**

**Direct Appeal from the Chancery Court for Robertson County
No. 13372 Carol Catalano, Judge**

No. M1999-01085-COA-R3-CV - Decided May 5, 2000

This divorce case involves the usual disputes over property and alimony. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

CANTRELL, P.J., M.S., delivered the opinion of the court, in which KOCH and COTTRELL, JJ. joined.

Mary Walker, Goodlettsville, Tennessee, for the appellant, Carl B. Brown, Jr., a/k/a Susan Rae Brown.

Mark T. Smith, Gallatin, Tennessee, for the appellee, Mary E. Brown.

MEMORANDUM OPINION¹

I.

Mary and Carl Brown married in Robertson County on June 14, 1969. At the time of the divorce in May of 1999 they had one adult son and a minor daughter. This appeal does not involve any question of child support.

¹Rule 10(b) of the Rules of the Court of Appeals reads as follows:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

The trial court awarded the wife a divorce, divided the marital property, ordered the husband to pay \$3,700 to the wife for her attorney's fee, and awarded the wife \$500 per month in support until her death or remarriage. The husband contests the division of the marital home, the award of attorney's fees and the length and duration of the alimony award.

II.

THE MARITAL HOME

The marital home was built on five acres of land titled in the husband and wife's joint names. They had owned another home which was sold and the proceeds used to build the marital residence. The husband's father gave the husband \$200,000 which was also used in the construction of the home.

The trial judge divided the equity in the home equally between the husband and wife. The husband concedes that the home was properly classified as marital property, but he contends that in the division he should have been credited with the \$200,000 he contributed from his separate funds.

In making this argument the husband makes the common mistake of viewing parts of the marital estate in isolation. Tenn. Code Ann. § 36-4-121(a)(1) requires the court to "equitably divide, distribute or assign the marital property between the parties." In doing so the court shall consider all relevant factors, including the age, vocational skills, and earning capacity of each party; the relative ability of each party for future acquisitions of capital assets and income; and the contribution of each party to the acquisition, preservation, appreciation, or dissipation of the marital or separate property. Tenn. Code Ann. § 36-4-121(c)(2)(3)(4).

The wife also owned some separate rental property, and she used the income from that property to pay marital expenses. She also inherited other property from her father, which she deposited in a joint account with the husband, to be used for family purposes.

The husband does not discuss the total amount of property awarded to each party nor why the statutory factors would dictate a different result.

The trial court's property distribution is presumed to be correct, unless the evidence preponderates against the decision. *Barnhill v. Barnhill*, 826 S.W.2d 443 (Tenn. App. 1991). In this case the trial judge recognized that the husband had invested the \$200,000 in the house, but the judge also pointed out that the wife's income from her separate property had also been spent for marital purposes. Considering the record as a whole, we cannot say that the division of the marital property was inequitable.

III.

ALIMONY

The trial judge's award of alimony is a matter of discretion also, depending on the facts of each case. *Lindsey v. Lindsey*, 976 S.W.2d 175 (Tenn. App. 1997). Rehabilitative support is preferred by the legislature, but long-term support and maintenance may be ordered where rehabilitation is not feasible. Tenn. Code Ann. § 36-5-101(d)(1). The court ordered the husband to pay the wife \$500 per month until her death or remarriage.

The husband does not argue how the factors set forth in Tenn. Code Ann. § 36-5-101(d) indicate that a different amount should have been awarded or how the duration should have been different. He does argue that since the couple's adult son is living with the wife, Tenn. Code Ann. § 36-5-101(a)(3)(B) raised a rebuttable presumption that the wife does not need the support awarded.

This appears, however, to be the first time the husband has raised the issue. It does not appear in the pleadings, and it does not appear to have been tried by consent. In neither the opening nor closing statements is the issue brought to the court's attention. In fact, in his opening statement, the husband's lawyer concedes that the son has had an unfortunate economic history and that both parties continue to contribute to his support – even though he is currently employed. The only reference to the son in the proof was made in connection with the wife's expense statement, but the court was never asked to indulge the presumption raised in Tenn. Code Ann. § 36-5-101(a)(3)(B).

This court's jurisdiction is appellate only, Tenn. Code Ann. § 16-4-108(a)(1), therefore we can only consider issues that have been presented to the trial court. *Gregory v. Susong*, 205 S.W.2d 6 (Tenn. 1947); *Clement v. Nichols*, 209 S.W.2d 23 (Tenn. 1948). Since this issue was not raised below, we cannot consider it here.

IV.

ATTORNEY'S FEES

A. IN THE TRIAL COURT

The trial judge found that the husband was entitled to \$3,700 as his share of the increase in one of his wife's assets during the marriage. The court then awarded that asset to the wife as alimony to partially compensate her for her attorney's fees. The husband argues that the court erred because the wife was financially able to pay her own fees.

Parties are entitled to attorney's fees when they lack sufficient funds to pay their own legal expenses or would find it necessary to deplete other assets to do so. *Brown v. Brown*, 913 S.W.2d 163 (Tenn. App. 1994). The award is within the discretion of the trial judge. *Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995).

In this case the only liquid asset the wife has is a \$16,000 savings account. We do not think the trial judge abused her discretion in making the \$3,700 award to the wife.

B. ON APPEAL

The wife has asked for an award of additional fees on appeal. We, however, think the parties in this case should bear their own legal expenses in the appellate courts.

We affirm the judgment below and remand this cause to the Chancery Court of Robertson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Carl B. Brown, Jr., a/k/a Susan Rae Brown.